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THE GENDER PAY GAP, IN RELATION TO PROFESSIONAL SPORTS

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I. INTRODUCTION

Since the inception of the United States of America the topic of equality has always been one of the most debated and discussed issues.¹ While the Declaration of Independence mentions the famous statement of “All men are created equally,” that is not a legally binding document.² It is the Constitution of the United States that is the law of the land, and the word equality does not appear anywhere within it.³ It is not until the Fourteenth Amendment that equality is presented.⁴

The topic of equality is one that branches off into numerous areas of the law, starting with - whether men and women are even considered equals.⁵ Since the ratification of the Constitution, there has been challenges brought to bring about gradual increases in rights and equality for both men and women. From the women’s suffrage movement, to the pro-choice movement, to the push for a new heightened review for sex and gender discrimination under Title VII of the Civil Rights Act, there has been a steady growth in ensuring men and women have equal rights.⁶

While laws such as the Civil Rights Act and Equal Pay Act have been passed with the purpose of promoting gender equity, inequalities in economic status remain unchanged. One of the most prominent examples of inequality between men and women can be seen in the

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¹ Charlotte Alter, *Here’s the History of the Battle for Equal Pay for American Women*, TIME (Apr. 14, 2105), <https://time.com/3774661/equal-pay-history/>.

² *The Declaration of Independence*, NATIONAL ARCHIVES, <https://www.archives.gov/founding-docs/declaration> (last visited Apr. 21, 2021).

³ *Equality and The Fourteenth Amendment: A New Constitution*, PBS, <https://www.archives.gov/founding-docs/declaration> (last visited Apr. 21, 2021).

⁴ *Id.*

⁵ U.S. CONST. Amend. XIV, § 1.

⁶ Sarah Pruitt, *8 Great Strides for Freedom in U.S. History*, HISTORY (Aug. 31, 2018), <https://www.history.com/news/8-moments-freedom-us-history>.

economic status of the two groups.⁷ The issue of equal pay for equal work performed has long been a contention where women receive less compensation than men for performing the same work.⁸

While the gender pay gap is evident across most industries that make up the American economy, one specific area that has gained attention in this pay disparity has been the sports industry.⁹ The gender pay gap has received widespread attention in sports because the most famous people in society are athletes and entertainers.¹⁰ Sports are a multi-billion-dollar business.¹¹ There are nearly fifty individual teams throughout the sports industry valued at a billion dollars or more.¹² Each of these teams are all male dominated teams.¹³

The male athletes are so widely known, because the industry continues to grow with fan support and consumer's willingness to spend their income on sports.¹⁴ These athletes are so known throughout the world that when they speak up about a cause or issue it leads to societal discussions and influences change.¹⁵ One issue that athletes have been using their platform to bring attention is the gender pay gap, specifically in sports.¹⁶ While the gender pay gap is prevalent in most aspects of working America, athletes began arguing for equal pay by posting on social media and speaking up at media sessions, which helped shed light on the issue to a wider range of people.¹⁷ The awareness not only brings the inequity to light, but the

⁷ Robin Bleweis, *Quick Facts About the Gender Wage Gap*, CENTER FOR AMERICAN PROGRESS (Mar. 24, 2020), <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/>.

⁸ *Id.*

⁹ Jamie Doward & Tali Fraser, *Hollywood's gender pay gap revealed: male stars earn \$1m more per film than women*, THE GUARDIAN (Sep. 15, 2019), <https://www.theguardian.com/world/2019/sep/15/hollywoods-gender-pay-gap-revealed-male-stars-earn-1m-more-per-film-than-women>.

¹⁰ *The Most Famous People in America*, YOUGov, <https://today.yougov.com/ratings/entertainment/fame/people/all> (last visited Apr. 21, 2021).

¹¹ Kurt Badenhausen, *The World's Most Valuable Sports Teams 2020*, FORBES (July 31, 2020), <https://www.forbes.com/sites/kurtbadenhausen/2020/07/31/the-worlds-most-valuable-sports-teams-2020/>.

¹² *Id.*

¹³ *Id.*

¹⁴ Ann C. Foster, *Movies, music, and sports: U.S. entertainer spending, 2008-2013*, U.S. BUREAU OF LABOR STATISTICS (Mar. 2015), <https://www.bls.gov/opub/btn/volume-4/movies-music-sports-entertainment-spending.htm>.

¹⁵ *Id.*

¹⁶ Dan Wolken, *NBA players using their power and influence to try and create meaningful change*, USA TODAY (Aug. 27, 2020), <https://www.usatoday.com/story/sports/columnist/dan-wolken/2020/08/27/nba-player-protests-influence-change/5641468002/>.

¹⁷ Peter Keating, *Analysis: What equal pay in sports really means, as the fight goes on for U.S. women's soccer*, ESPN (May 14, 2020), https://www.espn.com/espnw/story/_/id/28971949/analysis-equal-pay-sports-really-means-fight-goes-us-women-soccer.

both male and female athlete's intent to use their fame to address these issues, shifts public sentiment, leading to the enactment of laws and policies to resolve the wage gap.¹⁸

Gender equity is the process of fairness among women and men.¹⁹ In dealing with gender equity, there has to be an acknowledgement of historical and social disadvantages that prevent men and women from being on an equal level playing field.²⁰ Gender equity is not about equal treatment but it's about distributing things and benefits opportunity proportionate to what is needed in order to have both male and females on the same playing field.²¹ In discussing gender equity, there is the need for correcting gender biases so economic outcomes improve for females.²² Gender equity seeks to close the gap between gender bias.²³

It is believed that gender equity will lead to gender equality.²⁴ Gender equality requires equal enjoyment by women and men of socially valued goods, opportunities, resources, and rewards.²⁵ Gender equality does not imply that men and women will become equal in every aspect; only that access to opportunities and life changes is neither dependent on, nor constrained by, their sex.²⁶ To achieve gender equality requires women's empowerment to ensure that decision-making at private and public levels, and access to resources are no longer weighted in favor of men. Then both women and men can fully participate as equal partners in productive and reproductive life.²⁷ The overall objective of gender equality is to have a society in which women and men enjoy the same opportunities, rights and obligations in all spheres of life.²⁸ Equality between men and women exists when both sexes are able to share equally in the distribution of power and influence. They must have equal opportunities for financial

¹⁸ Jessica Golden, *Soccer star Megan Rapinoe speaks out about race and change as part of new Nike campaign*, CNBC (Jul. 30, 2020), <https://www.cnbc.com/2020/07/30/megan-rapinoe-speaks-out-about-race-and-change-in-nike-campaign.html>.

¹⁹ UNFPA, *Frequently asked questions about gender equality*, UNITED NATIONS POPULATION FUND (2005), <https://www.unfpa.org/resources/frequently-asked-questions-about-gender-equality>.

²⁰ *Id.*

²¹ Katica Roy, *Why We Need Gender Equity Now*, FORBES (Sep. 14, 2017), <https://www.forbes.com/sites/elleivate/2017/09/14/why-we-need-gender-equity-now/?sh=366363a177a2>.

²² *Id.*

²³ *Id.*

²⁴ UNFPA, *supra* note 19.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

independence through work or through setting up businesses. Additionally, they need to enjoy equal access to education and the opportunity to develop personal ambitions, interests, and talents.

In addressing the issue of gender equity in pay gaps, the first thing that needs to be examined is if there are any relevant laws addressing gender pay equality. When looking at laws that govern the United States, the Constitution is the first place to check.²⁹ While the Constitution does not mention equality in terms of compensation, it does imply a protection from laws.³⁰ Upon looking into the federal laws and statutes, the Equal Pay Act of 1963,³¹ the Title VII of the Civil Rights Act of 1964,³² and the Lilly Ledbetter Fair Pay Act of 2009³³ are the bodies of laws addressing the issue of equal pay.

In finding the relevant laws and policies that govern businesses and organizations, this Note will address the gender pay gap by specifically looking at how the pay gap has impacted numerous sport organizations.³⁴ Following the examination of the sports and entertainment industries, there will be a discussion of the pending cases addressing the gender pay gap in sports.³⁵ Part IV of this Note will give a recommendation of what can be done to eliminate gender-based wage discrimination. This Note will conclude with what the near and long-term future looks like for gender pay discrimination in sports.

II. EQUAL PAY AND THE LAW

In determining what protections and rights are afforded to United States citizens, there must be an examination of both the federal and state laws that govern equal pay. In the case of equal and fair pay on a national level, there would be an examination of rights afforded either by the Constitution and/or the laws enacted by Congress.

²⁹ U.S. CONST. Art IV.

³⁰ *Id.*

³¹ Equal Pay Act of 1963, 29 U.S.C. § 26.

³² Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964).

³³ Lilly Ledbetter Fair Pay Act of 2009 §181, § 42 U.S.C. § 2000 (2009).

³⁴ Temika Hampton, *Why Should We Care about the Gender Pay Gap in Professional Sports?*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/sports-and-entertainment-law/why-should-we-care-about-the-gender-pay-gap-in-professional-sports/ (last visited Apr. 21, 2021).

³⁵ Alex Morgan, et al. v. United States Soccer Federation, Inc., 445 F. Supp. 3d 635 (C.D. Cal. 2020).

a. Constitutionality of Equal Pay

In determining if equal pay is a protected right, the first place to check is the Constitution.³⁶ The United States Constitution is the law of the land.³⁷ The supremacy clause in the Constitution states that federal law supersedes any state laws.³⁸ The Declaration of Independence mentions equality when it states “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.”³⁹ The Constitution did not originally mention equality when it was signed in 1787.⁴⁰ However, the word equality is mentioned in the Fourteenth Amendment.⁴¹ The Fourteenth Amendment gives any person in the jurisdiction of the Constitution an equal protection of the law.⁴²

Although the Constitution provides for equal protection of each person under its jurisdiction, there is no mention of the right of equal pay for each person.⁴³ The fact that there is no equality in the Constitution should not be surprising because the Constitution initially considered slaves to only be equivalent to three-fifths of a person.⁴⁴ Originally, the Constitution only allowed white male citizens over the age of twenty-one to vote.⁴⁵ It was not until the enactment of the Fifteenth Amendment, granting all men the right to vote.⁴⁶ Women did not have the right to vote until Congress passed and ratified the Nineteenth Amendment.⁴⁷ Based on the information provided so far, it may seem unlikely that the Constitution would provide specific protections for equal pay. While there are no specific equal pay provisions, the Constitution does establish that all persons must be given equal protection when there are relevant laws that addresses an issue.⁴⁸

³⁶ U.S. CONST. art. VI.

³⁷ *Id.*

³⁸ *Id.*

³⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁴⁰ U.S. CONST.

⁴¹ U.S. CONST. Amend. XIV, § I.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ U.S. CONST. art. I, § 2, cl. 3.

⁴⁵ *Elections and Voting*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/elections-and-voting/> (last visited Apr. 21, 2021).

⁴⁶ U.S. CONST. Amend. XV.

⁴⁷ U.S. CONST. Amend. XIX.

⁴⁸ U.S. CONST. Amend. XIV.

b. Federal Statutes of Equal Pay

Over the decades there have been numerous federal statutes that have passed to address the issue of the gender pay gap.⁴⁹ The three major statutes that address the issue of unequal pay have been the Equal Pay Act of 1963, the Civil Rights Act of 1964, specifically Title VII of that act, and the Lilly Ledbetter Fair Pay Act of 2009.⁵⁰ A fourth statute, the Paycheck Fairness Act, has been proposed to amend the Equal Pay Act, but Congress has not yet passed the act.⁵¹ The three statutes that have been enacted have attempted to address the wage gap in a variety of different capacities.⁵²

i. Equal Pay Act of 1963

The Equal Pay Act of 1963 (EPA) was signed into law by President John F. Kennedy on June 10, 1963.⁵³ According to government data, at the time the act was signed, full-time working women were receiving an average pay of fifty-nine cents to every dollar their male counterparts received.⁵⁴ The EPA is the oldest civil rights law enforced by the United States Equal Employment Opportunity Commission (EEOC) that address the workplace.⁵⁵ The EPA prohibits discrimination on the basis of sex in the payment of wages or benefits, where men and women perform work of similar skill, effort, and responsibility for the same employer under similar working conditions.⁵⁶ The act makes it illegal for employers to pay women lower wages than men for the same amount of work that requires the same skill, effort, and responsibility.⁵⁷ If there is a violation the act, the employee may file a cause of action for the recovery of damages.⁵⁸

⁴⁹ Katherine McAnallen, *The Current State of Equal Pay Laws*, NCSL (Oct. 2015), <https://www.ncsl.org/research/labor-and-employment/the-current-state-of-equal-pay-laws.aspx>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *The Equal Pay Act Turns 40*, EEOC (June 10, 2003), <https://web.archive.org/web/20120626131413/http://archive.eeoc.gov/epa/anniversary/epa-40.html>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ McAnallen, *supra* note 49.

⁵⁸ *Id.*

In the 1940s, during World War II, women occupied jobs, initially held by men, as men fought in the war.⁵⁹ Women made up a quarter of the workforce by the early twentieth century.⁶⁰ It was during that time where the origins of the EPA can be traced.⁶¹ In 1942, for example, the National War Labor Board endorsed policies to provide equal pay in areas where women were directly replacing male workers.⁶² In 1944, a bill was introduced to Congress to prohibit discrimination in pay on account of sex.⁶³ While the bill did not pass, it served as the precursor to the EPA.⁶⁴

When the EPA did pass in 1963, Congress acknowledged in its “Declaration of Purpose” that sex-based discrimination in pay depresses wages and living standard for employees who rely on such wages for their health and efficiency.⁶⁵ It also prevents maximum utilization of the available labor resources and tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce; which is an unfair method of competition.⁶⁶ With the inclusion of this statement by Congress, it showed Congress’s intent to protect employees from wage discrimination based on sex.⁶⁷ The Supreme Court has expressly recognized that EPA must be broadly construed to achieve Congress’ goal of remedying sexual discrimination.⁶⁸ Congress enacted the EPA out of “concern for the weaker bargaining position of women” and an intent to provide a remedy to discriminatory wage structures that reflect “an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman.”⁶⁹

Under the EPA, it is unlawful for employers to reduce the wages of either sex to equalize pay between men and women.⁷⁰ A violation may occur where a different wage is paid to a person who worked in the same job before.⁷¹ Another violation may be after an employee of the opposite sex or take place where a labor union causes

⁵⁹ *Id.*

⁶⁰ *Equal Pay Act*, HISTORY (Apr. 2, 2019), <https://www.history.com/topics/womens-rights/equal-pay-act>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974).

⁶⁴ *Id.*

⁶⁵ *The Equal Pay Act Turns 40*, *supra* note 53.

⁶⁶ *Id.*

⁶⁷ *Corning Glass Works*, 417 U.S. at 208.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *The Equal Pay Act Turns 40*, *supra* note 53.

⁷¹ *Id.*

the employer to violate the law.⁷² An employer is permitted to base salary differences on seniority, merit, and quantity or quality of production.⁷³ Generally, any other business-related factor is considered as long as it is not based on a person's sex.⁷⁴ Employers found in violation of the EPA can be compelled to provide injured employees with back pay, punitive relief, and liquidated damages if the violation is shown to be willful.⁷⁵

If an employer is found to have violated the act, there are several penalties that can be enforced.⁷⁶ These penalties include fines of up to ten thousand dollars and/or imprisonment of up to six months.⁷⁷ There is also the right to claim damages, cause of action, attorney's fees, litigation costs, and the right to terminate the cause of action.⁷⁸ The employer would be liable for legal or equitable relief, including but not limited to, limitation employment, reinstatement, promotion, and the payment of lost wages and liquidated damages.⁷⁹ There is also the possibility of employers paying wages and compensation, waiver of claims, and even causes of actions filed by the Secretary.⁸⁰ The EPA also has the ability to bring civil penalties to violators.⁸¹

ii. Title VII of Civil Rights Act

The Civil Rights Act of 1964, which was passed one year after the EPA was enacted, is a bill that encompasses both civil rights and labor laws.⁸² It outlaws discrimination based on race, color, religion, sex, national origin, and sexual orientation.⁸³ It prohibits unequal application of voter registration requirements, racial segregation in schools and public accommodations, and employment discrimination.⁸⁴

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *The Equal Pay Act of 1963*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/statutes/equal-pay-act-1963> (last visited Apr. 21, 2021).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964> (last visited Apr. 21, 2021).

⁸³ *Id.*

⁸⁴ *Id.*

In relation to the gender pay gap, it is specifically in Title VII of the Civil Rights Act, where it protects discrimination in employment based on age, race or gender.⁸⁵ The act prohibits discrimination in employment based on sex, and has also been used in wage discrimination claims.⁸⁶ If an employee wishes to pursue a claim under Title VII, they must first file a complaint with the EEOC, who investigates the claim and determines if there is sufficient merit to bring suit.⁸⁷

The Civil Rights Act was first proposed by President John F. Kennedy in 1963.⁸⁸ After President Kennedy was assassinated in November of 1963, Lyndon B. Johnson became President and took up the issue.⁸⁹ The first time President Johnson addressed a joint session of Congress he said, “No memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long.”⁹⁰ It took over six months and much contention to get the bill to pass both houses of Congress before it was enacted.⁹¹

Title VII of the Civil Rights Act covers all private employers, including state and local governments, and educational institutions with fifteen or more employees.⁹² This barred race, religious, national origin and gender discrimination by employers and labor unions.⁹³ It gave the EEOC the power to file lawsuits on behalf of aggrieved workers.⁹⁴ Title VII, along with the creation of the EEOC, the commission was given the ability to prevent those unlawful employment practices.⁹⁵ The EEOC not only investigated, but also mediated and filed lawsuits on employees' behalf.⁹⁶ While the EEOC

⁸⁵ McAnallen, *supra* note 49.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Radio and television address on civil rights, 11 June 1963*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, <https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/045/JFKPOF-045-005> (last visited Apr. 21, 2021).

⁸⁹ *Civil Rights Act of 1964*, HISTORY (Jan. 4, 2010), <https://www.history.com/topics/black-history/civil-rights-act>.

⁹⁰ 23 No. 9 N.Y. Emp. L. Letter 6.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Title VII of the Civil Rights Act of 1964*, *supra* note 82.

⁹⁶ *Id.*

does bring claims against employers, Title VII gives an individual the right to directly bring a private lawsuit.⁹⁷

There are exceptions to four types of employers under Title VII.⁹⁸ Those four types of employers are the federal government; federally recognized Native American tribes; religious groups performing work connected to the group's activities, including associated education institutions; and Bona fide nonprofit private membership organizations.⁹⁹ There is also the Bennett Amendment, which attached the four EPA affirmative defenses that were previously mentioned, to all Title VII claims.¹⁰⁰

iii. Lilly Ledbetter Fair Pay Act

The most recently enacted federal statute dealing with equal pay was The Lilly Ledbetter Fair Pact Act of 2009.¹⁰¹ This was the first bill signed into law by President Barack Obama after being elected as President.¹⁰² The act changed the statute of limitations for filing an equal pay lawsuit from 180 days to a complete reset with every paycheck that is affected by a discriminatory action.¹⁰³

The act directly addresses the decision of the Supreme Court in the case of *Ledbetter v. Goodyear Tire & Rubber Co.*¹⁰⁴ In this case, Ms. Ledbetter was a former employee of Goodyear Tire.¹⁰⁵ Ms. Ledbetter brought action against Goodyear because her pay never reached the same level as her similar male coworkers.¹⁰⁶ Goodyear successfully argued before the Court that Ms. Ledbetter's claims were time-barred, because the discriminatory decisions related to pay had been made more than 180 days (the limitations period under Title VII) prior to the date she filed her claim with the EEOC.¹⁰⁷ Justice Ruth Bader

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ The Bennett Amendment, 1 Manual on Employment Discrimination § 2:38.

¹⁰¹ McAnallen, *supra* note 49.

¹⁰² Remarks of President Barack Obama on the Lilly Ledbetter Fair Pay Restoration Act Bill Signing, THE WHITE HOUSE (Jan. 29, 2019), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-barack-obama-lilly-ledbetter-fair-pay-restoration-act-bill-signin>.

¹⁰³ *Id.*

¹⁰⁴ Joanna L. Grossman, *The Lilly Ledbetter Fair Pay Act of 2009: President Obama's First Signed Bill Restores Essential Protection Against Pay Discrimination*, FINDLAW (Feb. 13, 2009), <https://supreme.findlaw.com/legal-commentary/the-lilly-ledbetter-fair-pay-act-of-2009.html>.

¹⁰⁵ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

¹⁰⁶ *Id.*

¹⁰⁷ Grossman, *supra* note 104.

Ginsburg strongly dissented with the Court's 5-4 decision and told Congress "the ball was now in their court."¹⁰⁸ Congress took action and drafted two versions a potential equal pay for equal work bill within a few weeks of the Courts' decision.¹⁰⁹ While the bill was threatened to be vetoed by President Bush, it became law under President Obama upon taking office.¹¹⁰

The Lilly Ledbetter Fair Pay Act focused on the statute of limitations for wage discrimination claims specifically restarting every time an unequal paycheck is issued.¹¹¹ The statute of limitations does not run until the women discovers they are being paid less than their male counterparts.¹¹² The act takes a broad view of the employment practices that trigger the limitations period under Title VII.¹¹³ The act also includes compensation discrimination, which is unequal pay based solely on sex or religion.¹¹⁴ The act is the most recently passed federal statute regarding equal pay.¹¹⁵ The Paycheck Fairness Act is a proposed amendment to the Equal Pay Act.¹¹⁶ The proposed act would amend the Equal Pay Act to include remedies, enforcement, and exceptions to prohibitions against sex discrimination in the payment of wages but has not been passed by Congress.¹¹⁷

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ McAnallen, *supra* note 49.

¹¹² *Id.*

¹¹³ Grossman, *supra* note 104.

¹¹⁴ *Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act of 2009*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/guidance/equal-pay-act-1963-and-lilly-ledbetter-fair-pay-act-2009> (last visited Apr. 17, 2021).

¹¹⁵ McAnallen, *supra* note 49.

¹¹⁶ *Paycheck Fairness Act*, CONGRESS, <https://www.congress.gov/bill/113th-congress/senate-bill/2199> (last visited Apr. 18, 2021).

¹¹⁷ *Id.*

III. PROFESSIONAL SPORTS AND EQUAL PAY

a. Income and Pay Equity Among American Professional Athletics

i. Women's Sports Leagues

The sports and entertainment industries make up nearly five percent of the annual gross domestic product (GDP) of the United States.¹¹⁸ In discussing the wage gap in sports, it is a discussion that needs to be entirely focused on professional sports. The reason for that is because college athletes are unpaid, compared to their professional counterparts.¹¹⁹

Collegiate athletics, which is a multi-billion-dollar industry because of the revenue it generates from television deals and sponsorships, is completely different compared to the professional sports world.¹²⁰ Collegiate athletics are not paid for their activities.¹²¹ The rationale behind not paying college athletes is that the athletes are given scholarships for their education and are doing it for the love of the game.¹²² The schools themselves benefit greatly from the revenue brought in by college sports.¹²³ There has been positive headway in the possibility that student athletes may begin to be compensated.¹²⁴ While that may lead to a gender pay issue down the road, and since male and female college athletics bring in much different revenue, that discussion is outside the scope of this Note.¹²⁵

¹¹⁸ *Percentage added to the Gross Domestic Product (GDP) of the United States of America in 2019, by industry*, STATISTA, <https://www.statista.com/statistics/248004/percentage-added-to-the-us-gdp-by-industry/> (last visited Sep. 25, 2020).

¹¹⁹ Patrick Hruby, *The NCAA says paying athletes hurts their education. That's laughable*, THE WASH. POST (Sept. 20, 2018), <https://www.chicagotribune.com/sports/college/ct-spt-paying-college-athletes-ncaa-commentary-20180920-story.html>.

¹²⁰ *Finances of Intercollegiate Athletics*, NCAA, <https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics> (last visited Apr. 18, 2021).

¹²¹ Bomani Jones, *College Football Players Are Unpaid Stars On The Field—And Have No Power Off It*, VANITY FAIR (Aug. 27, 2020), <https://www.vanityfair.com/culture/2020/08/college-football-unpaid-stars-with-no-power>.

¹²² Steve Cameron, *The NCAA brings in \$1 billion a year—here's why it refuses to pay its college athletes*, INSIDER (Mar. 26, 2019), <https://www.businessinsider.com/ncaa-college-athletes-march-madness-basketball-football-sports-not-paid-2019-3>.

¹²³ *Id.*

¹²⁴ Braktkton Booker, *College Athletes Are Now Closer To Getting Paid After NCAA Board Oks Plan*, NPR (Apr. 29, 2020), <https://www.npr.org/2020/04/29/847781624/college-players-are-now-closer-to-getting-paid-after-ncaa-board-oks-plan>.

¹²⁵ Luke Meredith, *NCAA Title IX report: Spending up, gender gaps remain*, AP NEWS (June 21, 2017), <https://apnews.com/article/7b4e53eb40094a3b8337f322b715e57a>.

The most preferred sports in the United States are football, baseball, basketball, and hockey. Those four have been described as the “Major Four.”¹²⁶ Other sports that have broad appeal include tennis, golf, soccer, and stock car racing.¹²⁷ The Major Four sports however generate the most revenue and interest in terms of television ratings and internet activity.¹²⁸ The Major Four, on a professional level, each have a dominant organization that runs and operates each sport.¹²⁹ The organizations running the four major sports are Major League Baseball (MLB), the National Football League (NFL), the National Basketball Association (NBA), and the National Hockey League (NHL).¹³⁰ The MLB, NBA, NFL, and NHL are all entirely made up of male athletes.¹³¹ The Women National Basketball Association (WNBA), the Ladies Professional Golf Association (LPGA), the Women’s Major League Soccer (WMLS), and the National Pro Fastball league (NPFL), are the major professional sports leagues dedicated to women athletes.¹³²

During the COVID-19 pandemic of 2020, all the sports leagues in the United States had to shut down for an extended period of time.¹³³ When the world started to open from the shutdown it led to an unprecedented time where almost all major sports were playing their games at the same time¹³⁴. The concurrent playing of all the major sports occurred after one of the longest periods of American history without major professional sports occurring.¹³⁵ While the four major

¹²⁶ Nate Silver, *The ‘Big Five’ in North American Pro Sports*, FIVE THIRTY EIGHT (Apr. 4, 2014), <https://fivethirtyeight.com/features/theres-a-big-five-in-north-american-pro-sports/>.

¹²⁷ Sourav, *Top 10 Most Popular Sports in American 2021 (TV Ratings)*, SPORTS SHOW (Mar. 23, 2021), <https://sportsshow.net/most-popular-sports-in-america/>.

¹²⁸ *Id.*

¹²⁹ *Major Professional Sports Leagues: The US & Canada*, THE DAILY GAZETTE, <https://dailygazette.com/major-professional-sports-leagues-the-us-canada/> (last visited Apr. 18, 2021).

¹³⁰ *Id.*

¹³¹ Jane McManus, *Can women play with the men?*, ESPN (May 9, 2011), https://www.espn.com/espnw/news/story/_/id/6495612/women-pro-sports-women-play-men.

¹³² Tom Goldman, *After World Cup Win, Other U.S. Women’s Sports Leagues Ask, ‘What About Us?’*, NPR (Aug. 8, 2019), <https://www.npr.org/2019/08/08/747766451/after-world-cup-win-other-u-s-womens-sports-leagues-ask-what-about-us>.

¹³³ Joseph Zucker, *Timeline of Coronavirus’ Impact on Sports*, BLEACHER REPORT, <https://bleacherreport.com/articles/2880569-timeline-of-coronavirus-impact-on-sports> (last visited Apr. 18, 2021).

¹³⁴ Nick Alvarez, *A complete list of the 12 games making up the most epic sports equinox*, USA TODAY (Sep. 10, 2020), <https://ftw.usatoday.com/2020/09/nfl-schedule-nba-mlb-nhl-sports-equinox>.

¹³⁵ Tracy Ringolsby, *American Sporting Public’s Longest Drought Without a Game From the Big 4 Has Ended*, SI: IN SIDE THE SIMS (July 23, 2020), <https://www.si.com/mlb/rockies/mlb-at-large/american-sporting-publics-longest-drought-without-a-game-from-the-big-4-has-ended>.

sports, MLB, NFL, NBA, and NHL all had games simultaneously occurring, other professional leagues were playing their games at that time.¹³⁶ When the Major Four started playing again, there was much attention given to their restarting. Other leagues that started playing again, received much less attention.¹³⁷ The women dominated organizations such as the WNBA, NWSL, and the LPGA also continued to operate, but due to the volume of sports on television those sports were not given much attention.¹³⁸

The landscape of American sports is important prior to discussions of the wage gap in sports because it paints a picture of the industry and competition for both revenue and interest. While sports in the United States is a multi-billion-dollar industry, not every sport is given an equal share of contribution to the preverbal multi-billion-dollar pie.¹³⁹ In looking at male and female athletes, specifically the top one hundred in the world, all one hundred are men.¹⁴⁰ The sports gender pay gap is so great it is estimated that NBA players earn one hundred times the salaries of their female WNBA counterparts.¹⁴¹ Even taking the ten highest paid female athletes in the world and combining their incomes, it would not be as much as the three highest earning male athletes.¹⁴² The ten highest paid female athletes combined earned \$105,000,000.¹⁴³ The three top earning male athletes over the same period each earned more than \$105,000,000 each.¹⁴⁴

Over the past twenty-five years, media companies have spent billions of dollars on television and streaming deals for live sports content.¹⁴⁵ As a result there has been an explosion in player salaries in

¹³⁶ *Id.*

¹³⁷ Ben Pickman, *How COVID-19 is Affecting Female Athletes, Women's Sports Leagues*, SPORTS ILLUSTRATED (Mar. 26, 2020), <https://www.si.com/sports-illustrated/2020/03/26/coronavirus-impact-women-sports-leagues>.

¹³⁸ Will Leitch, *Why are Pandemic Sports Ratings So Terrible?*, N.Y. MAGAZINE (Oct. 6, 2020), <https://nymag.com/intelligencer/2020/10/why-are-pandemic-sports-ratings-so-terrible.html>.

¹³⁹ TJ Mathewson, *TV is biggest driver in global sport league revenue*, GLOBAL SPORT MATTERS (Mar. 7, 2019), <https://globalsportmatters.com/business/2019/03/07/tv-is-biggest-driver-in-global-sport-league-revenue/>.

¹⁴⁰ Kim Elssesser, *8 Unbelievable Gender Pay Gap Statistics From Top Athletes, Actors and CEOs*, FORBES (Aug. 27, 2018), <https://www.forbes.com/sites/kimelsesser/2018/08/27/8-unbelievable-gender-pay-gap-statistics-from-top-athletes-actors-and-ceos/?sh=72a569be6559>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Olivia Abrams, *Why Female Athletes Earn Less Than Men Across Most Sports*, FORBES (June 23, 2019), <https://www.forbes.com/sites/oliviaabrams/2019/06/23/why-female-athletes-earn-less-than-men-across-most-sports/?sh=6246c6740fbc>.

the major men's sports leagues.¹⁴⁶ Team sport athletes represent eighty percent of *Forbes'* highest-paid athletes list.¹⁴⁷ The difference in television money between men and women sports leagues is vast.¹⁴⁸ MLB is a ten-billion-dollar organization in terms of revenue generated with players making on average three million dollars a year while in the NPFL, players make an average of five to six thousand dollars a year.¹⁴⁹ The WNBA generates roughly twenty-five million dollars from its television deal annually, while the NBAs annual revenue for its television deal is almost a hundred times larger than the WNBA.¹⁵⁰ That disparity in television deals results in NBA players averaging millions of dollars per year per playing, while the WBNA average salary is in the thousands.¹⁵¹ The WNBA has recently signed more television deals with the hope that more exposure will lead to more endorsements, resulting in a larger revenue.¹⁵²

In certain sports, there has been more progress than others. In tennis, for example there has been progress with the prize money being equal for both the men and women champions at two out of the four of the sports major championship tournaments.¹⁵³ The records show that equal pay has not hurt one of those major events, as prize money has nearly doubled in the last five years for both male and female athletes.¹⁵⁴ That shift in how prize money is distributed may be one of the main reasons that over the past decade the top female athletes in terms of salary have been tennis players.¹⁵⁵ Additionally, in golf at one of the sports four major tournaments, both male and female athletes are paid equally for winning.¹⁵⁶

ii. National Female Teams

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Maya Salam, *In Her Words: The Long Fight for Pay Equality in Sports*, N.Y. TIMES (Mar. 11, 2019), <https://www.nytimes.com/2019/03/11/sports/us-womens-soccer-pay.html>.

¹⁵⁴ Hampton, *supra* note 34.

¹⁵⁵ Abrams, *supra* note 145.

¹⁵⁶ Salam, *supra* note 153.

Aside from the women's professional sports leagues in the United States, there are numerous national teams.¹⁵⁷ These teams compete in international competition like the Olympics, FIFA (soccer), and FIBA (basketball).¹⁵⁸ Probably the most accomplished team is the Women's National Soccer Team (USWNT).¹⁵⁹ They have won many international competitions, including four World Cups and four Olympic gold medals.¹⁶⁰ With their popularity, many on the team have used their fame to bring attention to the cause of equal pay and the gender gap between the men and women teams.¹⁶¹

While a strong argument has been made in reference to WNBA players making less than the NBA players, because of the shorter season and less revenue, the same is not the case for the USWNT.¹⁶² Each player on the USWNT earns \$99,000 per year provided the team wins twenty 'friendlies' (exhibition matches), which is the minimum number of matches they would play.¹⁶³ By contrast, men soccer players would each earn \$263,320 for the same feat and would still earn \$100,000 if the team lost all twenty games.¹⁶⁴ The women receive no extra pay for playing more than twenty matches, while the men earn anywhere between \$5,000 and \$17,625 for each match beyond the required twenty.¹⁶⁵ The USWNT games have generated more revenue than the men's team over the last five years.¹⁶⁶ Even with the women's USWNT games generating more income than the men, the women's teams still earn roughly two-third less than men.¹⁶⁷

A part of the discussion on the pay gap and the fight to address it deals with collective bargaining. Professional athletes who are represented by labor unions, like the Women's National Basketball Players Association (WNBA) or U.S. Women's National Soccer Team

¹⁵⁷ TEAM USA, <https://www.teamusa.org/> (last visited Apr. 18, 2021).

¹⁵⁸ Max Fiege, *FIEGE: FIBA Versus FIFA*, THE HOYA (Sept. 12, 2014), <https://thehoya.com/fiege-fiba-versus-fifa/>.

¹⁵⁹ Caitlin Murray, *The inside story of how the USWNT became the most dominant force in women's football*, GOAL, <https://www.goal.com/story/inside-story-USWNT-dominance/index.html> (last visited Apr. 18, 2021).

¹⁶⁰ *Id.*

¹⁶¹ Shanna McCarriston, *U.S. women's soccer team granted class status in equal pay lawsuit, judge dismisses U.S. Soccer's argument*, CBS (Nov. 8, 2019), <https://www.cbssports.com/soccer/news/u-s-womens-soccer-team-granted-class-status-in-equal-pay-lawsuit-judge-dismisses-u-s-soccers-argument/>.

¹⁶² Hampton, *supra* note 34.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Abrams, *supra* note 145.

¹⁶⁷ Kim Kelly, *Pay Discrimination in Women's Sports Is a Labor Issue*, TEEN VOGUE (July 29, 2019), <https://www.teenvogue.com/story/pay-discrimination-women-sports-labor-issue>.

Players Association (USWNSTPA), regularly engage in contract negotiations with their employers.¹⁶⁸ Union member athletes are able to use their collective bargaining agreements to address concerns and push for improvements in pay, benefits, and working conditions.¹⁶⁹ The USWNT collective agreement does not expire until 2022.¹⁷⁰ The significance of that is because they have an agreement in place, they are locked into the terms previously agreed upon until it expires.

In hockey, the Women's National Hockey team announced that it would boycott the coming world championship if U.S.A. Hockey, the organization that runs the national hockey teams, did not increase the women's wages in March of 2017.¹⁷¹ Their gamble paid off when the team and U.S.A. Hockey reached a four-year deal that gave the female players a \$2,000 training stipend each month from the United States Olympic Committee and larger bonuses for winning medals.¹⁷² Originally, before reaching the new deal, they did not receive any type of stipend for training and were not promised bonuses if they got medals.¹⁷³ The women from the team commented on their victory for more equal wages by saying they "wanted to do the fair thing, and the right thing, not just for hockey but for all women."¹⁷⁴

b. Case Involving Rights to Equal Pay

The United State Senior Women's National Soccer Team ("WNT") filed an action against the United States Soccer Federation, Inc. ("USSF").¹⁷⁵ WNT asserted two claims against USSF, a violation of the Equal Pay Act (EPA), and a violation of Title VII of the Civil Rights Act of 1964.¹⁷⁶ WNT were looking to recuperate what they alleged was sixty-seven million dollars in back pay for the entire team.¹⁷⁷

A key point in the suit was that if both the men and women played the same amount of games and won the same amount of games,

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Salam, *supra* note 153.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Alex Morgan, et al.*, 445 F. Supp. 3d at 635.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

the pay would be greatly different.¹⁷⁸ The difference would be that women would earn nearly three times the amount the men would get.¹⁷⁹ In the lawsuit, the USWNT argued that even though the women won the 2015 championship, they were paid less than a third of what the men's team received for losing in the round of 16, which was three round outside of making it to the finals, in 2014.¹⁸⁰ It was alleged in the suit that the decision of how much the men and women were getting paid did not come from the international body where the money was won, but with the USSF deciding how the winning were distributed.¹⁸¹ The USSF countered by saying the difference in available prize money between the men and women reflected the disparity.¹⁸² The federation filed thousands of pages of documents asserting, as one motion put it, "WNT and MNT (Men's National Team) players do not perform equal work requiring equal skill, effort and responsibility under similar working conditions."¹⁸³

A federal judge ruled in favor with U.S. Soccer on most of the issues in the lawsuit.¹⁸⁴ U.S. District Court Judge R. Gary Klausner held that the Women's National Team had agreed to the terms of the deal which including what their compensation would be.¹⁸⁵ He also found that the WNT made more money than the men's team from 2015 to 2019.¹⁸⁶ While the team does plan to appeal the ruling, crucial parts of the suit have been dismissed.¹⁸⁷ After the ruling, major sponsors of WNT, including Coca-Cola and Procter & Gamble, released statements supporting the female athletes.¹⁸⁸

IV. WHAT THE FUTURE HOLDS

¹⁷⁸ Renata Simril, *Money: Why Female Athletes Deserve Higher Pay*, FORBES, (Jun. 5, 2019), <https://www.forbes.com/sites/renatasimril/2019/06/05/show-her-the-money/?sh=7c534e1b6b55>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Keating, *supra* note 17.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

After the WNT case was dismissed, there were questions of what would be next in their fight for equal pay.¹⁸⁹ Recently there has been movement about the team moving forward with a possible appeal.¹⁹⁰ However, as to a separate issue of working conditions, the WNT reached a settlement with the USSF.¹⁹¹ The settlement occurred a month before the working conditions issue was set to go to trial.¹⁹² While the settlement was unrelated to the case that was dismissed regarding equal pay, the WNT has said they were waiting to resolve the working conditions issue before moving forward with the equal pay appeal.¹⁹³ In fact, soon after the settlement was announced, a spokesman for the WNT said they were not ready to file their appeal.¹⁹⁴ The current President of the USSF, Cindy Cone, has stated that she hopes to negotiate rather than continue legal action.¹⁹⁵ Ms. Cone has stated “the goal of USSF was to commit to equal pay.”¹⁹⁶

V. CONCLUSION

“Equal Pay! Equal Pay!” Those were the chants being echoed when the WNT won the World Cup in 2019.¹⁹⁷ As the President of FIFA was walking to present the trophy to the team, that was the sound being heard in the stadium and around the world on television.¹⁹⁸ When the team arrived back in America and had a parade in New York, the chants of “USA! Equal Pay!” again rang out from the crowds.¹⁹⁹ That imagery paints the perfect picture of the public sentiment toward the issue of equal pay. On the other end of the spectrum, early 2020 the USSF declared it was entitled to treat men better because of biology: “The overall soccer-playing ability required to compete at the senior men's national team level is materially influenced by the level of certain physical attributes, such as speed and

¹⁸⁹ *Id.*

¹⁹⁰ Steven Goff, *U.S. Soccer, women's team settle on working conditions, setting up appeal over equal pay*, THE WASH. POST (Dec. 1, 2020), <https://www.washingtonpost.com/sports/2020/12/01/uswnt-working-conditions-lawsuit/>.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Keating, *supra* note 17.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

strength.”²⁰⁰ It is the belief that the thousands of people cheering for equal pay will be the forecast of what is to come for the closing of the gender gap.

Since the time the EPA was passed in 1963, when the gender pay gap of women making fifty-nine cents compared to the dollar their men counterparts received, is now eighty-one cents for every dollar.²⁰¹ While the pay gap continues to exist, progress has been made and continues to be made. With respects to closing the wage gap in relation to sports an important stat to look at is 137,021 men played professional sports in the world in 2017 and just 1,287 women, a ratio of 106 to 1.²⁰² This gap in sport activities requires the recommendation that society invest more in women participating in sports. As this Note has hopefully shown, there are a multitude of reasons why the pay gap exists in sports. In order to close that gap, it has been argued that there are three main things that need to occur.²⁰³ The first is investment.²⁰⁴ This investment would be from both public and private places.²⁰⁵ Public entities, like governments supporting taxpayer funded stadiums and private investments in the marketing of female athletes needs to occur.²⁰⁶ There also needs to be time to let the leagues grow.²⁰⁷ Most female driven leagues are only a few decades old, compared to male leagues which have been around for over a century.²⁰⁸ There also needs to be more media presence to showcase the sports.²⁰⁹ Female sports need to be marketed and given awareness to grow their sports.²¹⁰

In addition, society has to show interest in wanting to end the pay gap. While the athletes are influential, real change cannot be made by them alone. In terms of the United States population, athletes only account for a miniscule percentage, so change can only happen if everyone makes the effort to encourage these institutions to change. The data has shown that sports are a huge part of our lives, not only

²⁰⁰ *Id.*

²⁰¹ *Women in the Labor Force: A Databook*, U.S BUREAU OF LABOR STATISTICS (Dec. 2019), <https://www.bls.gov/opub/reports/womens-databook/2019/home.htm>.

²⁰² Keating, *supra* note 17.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

do we invest our time and money, but also our emotions. If we can eliminate the pay gap in sports, it would be a gateway to eliminating the pay gap in all areas of the economy.